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PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

Elements of a compliance system and synthesis of submissions

Note by the co-Chairs of the joint working group on compliance

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I. INTRODUCTION

A. Mandate

1. During the tenth sessions of the subsidiary bodies, the joint working group on compliance (JWG) requested its co-Chairs, with the support of the secretariat, to produce a synthesis of responses by Parties to questions contained in its report,[1] including elements related to a compliance system under the Kyoto Protocol, for consideration by the JWG at its next session. Pursuant to the request of the JWG, three documents have been prepared. A compilation of 12 submissions[2] is contained in document FCCC/SB/1999/MISC.12 and Add.1. The synthesis of proposals is contained in the addendum to the present document, which presents the elements of a compliance system.

B. Scope of the note

2. This note has been prepared to assist the JWG in its deliberations on the development of a compliance system. It is recognized that other issues may emerge during the discussion, in particular in areas where Parties have not expressed any views in their responses. The note describes a broad convergence, among those Parties that have made submissions, on the objectives, coverage and functions of a compliance system. It outlines the possible institutional and procedural arrangements necessary for the performance of those functions, and indicates where further discussion is required about the various institutional and procedural aspects of a compliance system. Issues raised by Parties relating to an indicative list of consequences of non-compliance with the Kyoto Protocol are identified. Finally, a list of topics that could provide a framework for further work on a compliance system is proposed in the annex to this document.

C. Proposed action by the joint working group

3. The JWG may wish to consider the information provided in the three above-mentioned documents, and in particular:

(a) Comment on the approach outlined in the present note and give guidance on its further elaboration;

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[1] The report of the joint working group on its first session is contained in document FCCC/SBI/1999/8.

[2] Australia, Canada, China, Finland (on behalf of the European Community, its member States and Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia and Slovenia), Japan, the Republic of Korea, New Zealand, Poland, Samoa (on behalf of the Alliance of Small Island States), Saudi Arabia, Switzerland and the United States of America.

(b) Clarify and narrow the range of options for the design of the institutional and procedural arrangements of a compliance procedure;

(c) Advance consensus on the consequences of non-compliance, including those that could be associated with particular categories of non-compliance; and

(d) Request the co-Chairs to prepare, with the assistance of the secretariat, a text as a basis for further negotiation on a compliance system, taking into account the views expressed by Parties in their submissions, at the JWG and during the fifth session of the Conference of the Parties.

II. ELEMENTS OF A COMPLIANCE SYSTEM

A. Objectives, nature and principles

4. Responses from Parties indicate that a compliance system should promote implementation of the Kyoto Protocol and address potential non-compliance and non-compliance with commitments. To meet these objectives, the compliance system should seek to prevent non-compliance by providing opportunities for Parties having difficulty in complying to bring themselves into compliance, facilitate compliance by providing advice and assistance to individual Parties having difficulty in complying, and deter non-compliance by imposing consequences on Parties that have failed to comply.

5. The nature of the compliance system should be credible, efficient and fair, and provide for predictability, transparency and due process.

6. Further discussion will be required to determine how the compliance system can best take into account the principle of common but differentiated responsibilities under the Protocol.

B. Coverage

7. Parties' responses indicate that the compliance system would apply to the provisions of the Protocol as a whole. The compliance system would, however, need to take into account differences in the legal character and the specificity of these provisions. The commitments most relevant to the compliance system are those of Annex I Parties under Article 3. These commitments, together with those in Articles 5 and 7 (which are the means by which Annex I Parties demonstrate compliance with Article 3), as well as the mechanisms in Articles 6, 12 and 17 (which are the means some Annex I Parties may choose for meeting some of their commitments under Article 3) should be the main focus of the compliance system.

8. Parties' responses also suggest that the compliance system should consider the differences in the timing of the commitments, recognizing that some commitments are annual, some are due at the end of the commitment period, and others are continuous throughout the commitment period.

9. Consideration will need to be given by the JWG to the role of the compliance system in reviewing Parties' compliance with provisions adopted in accordance with Articles 3, 4, 5, 6, 7, 12 and 17.

C. Institutional and procedural aspects

10. The institutional and procedural arrangements that will make up the compliance system might be determined in accordance with various provisions of the Protocol.

Technical assessment

11. Technical assessment will mainly be undertaken by the expert review teams established under Article 8 of the Protocol. The role of expert review teams is to provide a technical assessment of all aspects of implementation of the commitments by an Annex I Party. This includes a review of information in the annual national inventory submitted for the purpose of ensuring compliance with Article 3, as well as supplementary information submitted in the national communication to demonstrate compliance with commitments under the Protocol.

12. The technical assessment would identify potential problems in, and factors influencing, the fulfilment of commitments. A view has been expressed that during the technical assessment inadvertent errors in the information submitted could be corrected.

13. Some Parties have suggested that questions identified by the experts may be automatically forwarded to the compliance body. However, other Parties' responses note that an expert review team should not have the authority to determine whether a Party is, or is not, in compliance; that function would be performed under the appropriate part of the compliance procedure.

Compliance procedure

14. All Parties support facilitative arrangements that would provide advice and assistance to any Party, including any non-Annex I Party, experiencing difficulty in complying with its commitments under the Protocol. Parties' responses suggest that a compliance procedure need not necessarily make a finding of non-compliance in order to recommend that a Party take a particular action, or that assistance be made available. A number of Parties suggest that the institutional and procedural aspects of establishing this part of the compliance procedure could benefit from the work carried out in designing a multilateral consultative process under Article 13 of the Convention.

15. Most Parties support the view that a compliance procedure could also have the functions of determining non-compliance and imposing binding consequences. These were referred to by some Parties as quasi-judicial or enforcement functions.

Treatment of cases

16. Parties' responses raise the issue of how the functions of facilitation and enforcement could best be carried out under a compliance procedure. One option that was put forward suggests that the facilitative and quasi-judicial or enforcement functions might best be performed by distinct procedures and/or by distinct bodies.

17. One approach would be that these functions operate in sequence, involving each body at different stages in the sequence. Any compliance-related problems would first be handled in a facilitative body. If a satisfactory result was not achieved based on the advice or assistance of the facilitative body, the matter could be referred to the quasi-judicial body authorized to impose consequences. Another approach would be to establish two bodies operating in parallel, with defined jurisdictions based on the nature of commitments at issue. Non-compliance with certain provisions, such as target-related commitments, could be referred immediately to the enforcement body. Matters related to compliance with other provisions could be referred to the facilitative body.

Eligibility to raise issues

18. A stage in the compliance procedure could be initiated by Parties, including by a Party with regard to its own compliance, and by a Party with regard to another Party's compliance. One issue that was raised is whether Protocol bodies, such as the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP), the subsidiary bodies, expert review team or the secretariat should be able to initiate the compliance procedure with regard to a particular Party. It was also proposed that no stage of a compliance procedure should proceed unless approved by the COP/MOP.

19. Some Parties have suggested that how issues would be taken up in the compliance procedure should depend on the commitments it covers, and/or the range of consequences it is authorized to generate. It was suggested that on the basis of commitments undertaken by a Party, non-Annex I Parties may be restricted in initiating the compliance procedure with regard to other Parties.

Structure

20. There is broad recognition of the need for one or more specialized compliance bodies with limited membership, and with expertise in legal and technical fields relevant to the implementation of the Protocol. The expertise and the capacity in which the members serve may

differ, if distinct bodies are established with distinct mandates. Most submissions support the establishment of at least one standing body. Suggestions were made for the establishment of committees and ad hoc bodies. Parties suggest that regular meetings, for example, once or twice a year in conjunction with the meetings of the subsidiary bodies and the COP/MOP may be needed.

Role of the COP/MOP

21. Parties recognized that the COP/MOP, as the supreme body of the Protocol, will play an important role in the compliance procedure. They note that the COP/MOP, in accordance with Article 8.5, is to consider the information submitted by each Party related to compliance with its commitments, reports of expert reviews assessing the implementation of the commitments of the Party, and any questions raised by Parties. The Protocol also provides, in Article 8.6, for the COP/MOP, pursuant to its consideration of this information, to take decisions on any matter required for the implementation of the Protocol. Further discussion is needed on the extent to which the COP/MOP should play a role in initiating a compliance procedure, as well as in approving and reviewing the outcome.

Implications for the Kyoto mechanisms

22. Some Parties raised the issue whether a sub-procedure, or a distinct procedure, is needed for the Kyoto mechanisms. As the rules and modalities for these mechanisms are still under development, Parties' responses pointed out that further work is needed in the future on compliance-related aspects of the Kyoto mechanisms.

D. Consequences of potential non-compliance and non-compliance

23. All submissions support the view that a compliance system should provide incentive measures as well as enforcement measures. Incentive measures were specified as providing appropriate assistance or advice to Parties; and helping to overcome difficulties encountered by individual Parties.

24. A number of enforcement measures were identified: issuing cautions; suspension of rights, including eligibility to participate in the Kyoto Protocol mechanisms under Articles 6, 12, and 17; and penalties. Divergent views were expressed on the application of financial penalties.

25. The importance of certainty and predictability in the application of consequences for non-compliance was widely recognized. A degree of automaticity in the determination and application of consequences could strengthen the effect of consequences and help ensure the consistent treatment of Parties. It was also recognized that principles of fairness and due process may require the compliance procedure to exercise discretion in the determination of consequences, including through an opportunity for review or appeal. An automatic outcome is

set out in Article 6.4[3] of the Protocol, and it has been suggested that swift resolution of compliance issues would be required.

26. The implications of binding consequences with respect to the provisions of Article 18 of the Protocol were noted by Parties, and may need special consideration.

E. Other matters

27. The issue of the relationship between the settlement of disputes under Article 19 and a compliance procedure, in particular the quasi-judicial part of that procedure, was raised. Also, the importance of the establishment of domestic compliance systems was stressed by some Parties. There is broad agreement that these issues need to be explored in the future.

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[3] Article 6.4 provides that if a question of implementation by an Annex I Party is identified by the expert review process in the context of joint implementation, transfers and acquisitions of emission reduction units may continue, provided that any such units may not be used by a Party to meet its commitments under Article 3 until any issues of compliance are resolved.

Annex

TOPICS TO BE COVERED IN FURTHER WORK ON A COMPLIANCE SYSTEM UNDER THE KYOTO PROTOCOL

- Objectives, nature, principles

- Coverage

- Functions of a compliance procedure (one body or bodies)

  - facilitation
  - enforcement

- Eligibility to raise issues

  - expert review team
  - other bodies
  - Parties

- Structure (of a compliance body or bodies)

  - nature (standing or ad hoc)
  - size (limited membership)
  - composition
  - expertise
  - capacity in which members act
  - length of membership, possibility of re-election
  - appointment of chairman and vice-chairman
  - frequency of meetings

- Rules of procedure (of a compliance body or bodies)

  - information gathering
  - rights of participation
  - decision making
  - confidentiality

- Relationship to other bodies under the Protocol (e.g. role of COP/MOP, any mechanism bodies)

- Consequences of potential non-compliance and non-compliance

  - interim measures
  - indicative list of measures (incentives, disincentives)
  - application of automatic consequences

- Linkages to Article 19 of the Kyoto Protocol